

## UNITED STATES DISTRICT COURT

## DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Case No. 3:22-cr-00067-ART-CSD-1

Plaintiff,

ORDER

v.

KRISTOPHER MYERS,

Defendant.

Before the Court is Defendant Kristopher Myers's motion to dismiss based on the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) (ECF No. 35). For the reasons stated below, the Court denies the motion.

**I. BACKGROUND**

Defendant Kristopher Myers was charged by Indictment with a single count of Possession of an Unregistered Firearm in violation of 26 U.S.C. § 5861(d), an offense under the National Firearms Act, 26 U.S.C. §§ 5801–5872 (“NFA”). (ECF No. 1.)

The relevant portion of the NFA provides, “It shall be unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.” 18 U.S.C. § 5861(d). The NFA defines “firearm” to include “a rifle having a barrel or barrels of less than 16 inches in length,” 26 U.S.C. § 5845(a). Guns of this length are commonly referred to as short-barreled rifles. Registering a firearm requires the payment of a \$200 tax; identification of the firearm to be registered; and identification of the applicant, including through copies of their fingerprints and a photograph. 26 U.S.C. §§ 5811–12, 5821–22.

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1           **II. DISCUSSION**

2       Myers moves to dismiss the indictment against him as violating his Second  
 3 Amendment rights under *Bruen*, 597 U.S. at 1. *District of Columbia v. Heller*, 554  
 4 U.S. 570 (2008), and *Bruen* recognized that the Second Amendment protects  
 5 individuals' rights to bear arms for the purpose of self-defense inside and outside  
 6 the home. *Heller*, 554 U.S. at 592; *Bruen*, 597 U.S. at 24. In *Bruen*, the Supreme  
 7 Court articulated a two-part test for determining whether firearms regulations  
 8 are "consistent with the Second Amendment's text and historical understanding,"  
 9 and thus constitutional. 597 U.S. at 24. Under the *Bruen* test: "When the Second  
 10 Amendment's plain text covers an individual's conduct, the Constitution  
 11 presumptively protects that conduct. The government must then justify its  
 12 regulation by demonstrating that it is consistent with the Nation's historical  
 13 tradition of firearm regulation." *Id.* The Ninth Circuit has restated the *Bruen* test  
 14 as follows:

15       We first consider whether the Second Amendment's plain text covers  
 16 an individual's proposed course of conduct. *Bruen*, 597 U.S. at 24 []. If so,  
 17 the Second Amendment presumptively protects that conduct. *Id.* The Government then bears the burden of justifying the  
 18 challenged regulation by showing that it is consistent with our nation's "historical tradition of firearm regulation." *Id.* Only then may we conclude that the regulation is constitutional. *Id.*

19       *United States v. Perez-Garcia*, 96 F.4th 1166, 1178 (9th Cir. 2023).

20       This case turns on "step one" of the *Bruen* test, namely, "whether the  
 21 Second Amendment's plain text covers [Myers's] proposed course of conduct." *Bruen*, 597 U.S. at 24. The Government argues that, unlike the firearms at issue  
 22 in *Heller* and *Bruen*, an unregistered short-barreled rifle is not protected by the  
 23 Second Amendment, so the Government prevails at step one. Myers counters that  
 24 short-barreled rifles are protected by the plain text of the Second Amendment,  
 25 thus satisfying step one, and that he must prevail at step two because the  
 26 Government has failed to offer any evidence to meet its burden under step two.  
 27 (ECF No. 35 at 1 (citing *Teter v. Lopez*, 76 F.4th 938 (9th Cir. 2023), vacated

1 *pending reh'g en banc*, 2024 WL 719051 (9th Cir. Feb. 22, 2024)).) Thus, both  
 2 parties agree that the answer to step one, namely whether the Second  
 3 Amendment protects Myers's alleged conduct (possessing an unregistered short-  
 4 barreled rifle), is dispositive.

5 *Bruen* step one involves a "threshold question" of whether the Second  
 6 Amendment "presumptively protects the individual's conduct." *Perez-Garcia*, 96  
 7 F.4th at 1178. Step one encompasses three related subparts. *See United States*  
 8 *v. Alaniz*, 69 F.4th 1124, 1128 (9th Cir. 2023) ("*Bruen* step one . . . requires a  
 9 textual analysis, determining whether the challenger is part of the people whom  
 10 the Second Amendment protects, whether the weapon at issue is in common use  
 11 today for self-defense, and whether the proposed course of conduct falls within  
 12 the Second Amendment.") (citing *Bruen*, 597 U.S. at 24; *Heller*, 554 U.S. at 580,  
 13 627). As the Ninth Circuit stated in *United States v. Duarte*, "Step one of *Bruen*  
 14 asks the 'threshold question' whether 'the Second Amendment's plain text covers'  
 15 (1) the individual, (2) the type of arm, and (3) the 'proposed course of conduct'  
 16 that are at issue." 101 F.4th 657, 671-72 (9th Cir. 2024) (citing *Bruen*, 597 U.S.  
 17 at 19, 31-32). Neither party disputes that Myers is "of the people" protected by  
 18 the Second Amendment. *See Duarte*, 101 F.4th at 673-75. The issue here is  
 19 whether a short-barreled rifle is the kind of weapon, and whether unregistered  
 20 possession of that weapon is the kind of conduct, protected by the Second  
 21 Amendment.

22 Not all "arms" are protected by the Second Amendment. The Supreme  
 23 Court in *Heller* recognized that the Second Amendment "extends only to certain  
 24 types of weapons." *See Heller*, 554 U.S. at 622 (discussing *United States v. Miller*,  
 25 307 U.S. 174, 178 (1939)). In *United States v. Miller*, the Court rejected a Second  
 26 Amendment challenge to an indictment charging the defendants with  
 27 transportation of an unregistered short-barreled shotgun in violation of the NFA.  
 28 *Heller*, 554 U.S. at 622-625 (discussing *Miller*, 307 U.S. at 178). The Court in

1       Heller discussed *Miller* and clarified that Miller’s actions were placed outside the  
 2 protection of the Second Amendment by of the type of weapon at issue, not by  
 3 Miller’s conduct. *Id.* at 622 (“It is entirely clear that the Court’s basis for saying  
 4 that the Second Amendment did not apply was *not* that the defendants were  
 5 ‘bear[ing] arms’ . . . for ‘nonmilitary use.’ Rather, it was that the *type of weapon*  
 6 *at issue* was not eligible for Second Amendment protection . . .”) (emphasis in  
 7 original). The Court in *Heller* concluded its discussion of *Miller* by stating: “[w]e  
 8 therefore read *Miller* to say only that the Second Amendment does not protect  
 9 those weapons not typically possessed by law-abiding citizens for lawful  
 10 purposes, such as short-barreled shotguns.” *Heller*, 554 U.S. at 625. The Court  
 11 added that the right to keep and bear arms under the Second Amendment is  
 12 limited to “the sorts of weapons” that were “in common use” at the time the  
 13 Second and Fourteenth Amendments were ratified, and it did not include  
 14 “dangerous and unusual weapons.” *Id.* at 627 (citations omitted). *Bruen*  
 15 reiterated the conclusion in *Heller* that there is a “historical tradition of  
 16 prohibiting the carrying of dangerous and unusual weapons.” 597 U.S. at 21  
 17 (quoting *Heller*, 554 U.S. at 627) (internal quotation marks omitted).

18       Myers takes issue with *Heller*’s language excluding certain weapons, like  
 19 short-barreled shotguns, from the scope of the Second Amendment’s text. Myers  
 20 argues that, for purposes of *Bruen* step one, the term “arms” means “all firearms,”  
 21 including short-barreled rifles. (ECF No. 64 at 3 (citing *Heller*, 554 U.S. at 581,  
 22 582).) Myers further argues, relying on *Bruen* and *Duarte*, that the question of  
 23 whether a weapon is “dangerous or unusual” must be addressed in *Bruen* step  
 24 two. (ECF No. 64 at 2-3.) This argument aligns with *Teter*, which indicated that  
 25 the question of whether a butterfly knife is a “dangerous and unusual” weapon  
 26 must be considered under *Bruen* step two. *Teter*, 76 F.4th at 950. But *Teter* is no  
 27 longer controlling on this Court, and it addressed the separate question of  
 28 whether a butterfly knife is an “arm” for purposes of the Second Amendment.

1        *Teter* does not undermine the Supreme Court’s conclusion in *Heller* that certain  
 2 weapons are simply not protected by the Second Amendment.

3        Myers’s position conflicts with the Supreme Court’s statement in *Heller*  
 4 that short-barreled shotguns are not protected by the Second Amendment. In  
 5 *Heller*, the Supreme Court explained that the text of the Second Amendment does  
 6 not reach dangerous and unusual weapons that are not typically possessed by  
 7 law-abiding citizens for lawful purposes, including, specifically, “short-barreled  
 8 shotguns.” *Heller*, 554 U.S. at 625, 627. Neither *Bruen* (which addressed  
 9 handguns), nor *Teter* (butterfly knives), nor *Duarte* (felon in possession of a  
 10 firearm) had occasion to revisit this point because none of those cases concerned  
 11 short-barreled weapons. *Heller*, 554 U.S. at 625, 627. *Bruen* affirmed *Heller*, see  
 12 *Bruen*, 597 U.S. at 17, and, as other courts have acknowledged, it reiterated  
 13 *Heller*’s statement that there is a “historical tradition of prohibiting the carrying  
 14 of ‘dangerous and unusual weapons’,” *Id.* at 21; *see United States v. Broadbent*,  
 15 2023 WL 6796468, at \*4 (E.D. Cal. Oct. 13, 2023) (citing *Bruen*, 597 U.S. at 21  
 16 (internal quotations omitted)). “Whatever changes *N.Y. State Rifle v. Bruen*  
 17 brought to the Second Amendment landscape, inclusion of dangerous and  
 18 unusual weapons in the Second Amendment right isn’t one such change.” *Id.*  
 19 (quoting *United States v. Sredl*, No. 3:22-CR-71 RLM-MGG, 2023 WL 3597715, at  
 20 \*3 (N.D. Ind. May 23, 2023)). This Court is not persuaded that *Bruen* altered  
 21 *Heller*’s conclusion that the Second Amendment does not apply to short-barreled  
 22 shotguns.

23        *Heller*’s statement that the Second Amendment does not apply to short-  
 24 barreled shotguns applies with equal force to short-barreled rifles. *See, e.g.*,  
 25 *United States v. Cox*, 235 F. Supp. 3d 1221, 1227 (D. Kan. 2017) (stating that a  
 26 short-barreled rifle is “clearly comparable to the short-barreled shotgun at issue  
 27 in *Miller*”). The Second Amendment protects arms “typically possessed by law-  
 28 abiding citizens for lawful purposes.” *Heller*, 554 U.S. at 625, 627. The NFA

1 regulates weapons typically used by criminals, not law-abiding citizens. As the  
 2 Supreme Court recognized in *United States v. Thompson/Ctr. Arms Co.*, 504 U.S.  
 3 505, 517 (1992), the object of the NFA “was to regulate certain weapons likely to  
 4 be used for criminal purposes, just as the regulation of short-barreled rifles, for  
 5 example, addresses a concealable weapon likely to be so used.” The NFA regulates  
 6 “only such modern and lethal weapons, except pistols and revolvers, as could be  
 7 used efficiently by criminals and gangsters.” *Id.* The provision of the NFA at issue  
 8 here, § 5816(d), prohibits possession of *unregistered* “short-barrel shotguns,  
 9 short-barrel rifles, machineguns, silencers, and destructive devices,” but it does  
 10 not apply to “basic handguns, revolvers, or long guns.” *See Broadbent*, 2023 WL  
 11 6796468, at \*4 (holding the Second Amendment does not apply to short-barreled  
 12 machine guns) (citing *Sredl*, 2023 WL 3597715, at \*3 (holding the Second  
 13 Amendment does not apply to unregistered firearms)).

14 Numerous lower courts have held, post-*Bruen*, that unregistered short-  
 15 barreled rifles are not protected by the Second Amendment because they are  
 16 “dangerous and unusual weapons” which are “not typically possessed by law-  
 17 abiding citizens for lawful purposes.” *See Heller*, 554 U.S. at 625, 627; *United*  
 18 *States v. Miller*, No. 3:23-CR-41-S, 2023 WL 6300581, at \*4 (N.D. Tex. Sept. 27,  
 19 2023) (holding that short-barreled rifles are dangerous and unusual weapons not  
 20 subject to Second Amendment protections); *United States v. Danielson*, No. 22-  
 21 299 (MJD/LIB), 2023 WL 5288049, at \*4-5 (D. Minn. Aug. 17, 2023) (upholding  
 22 the constitutionality of § 5861(d) regarding short-barreled rifles); *United States v.*  
 23 *Saleem*, No. 3:21-cr-86 (FDW/DSC), 2023 WL 2334417, at \*1 (W.D.N.C. Mar. 2,  
 24 2023) (rejecting a Second Amendment challenge as to short-barrel rifles); *United*  
 25 *States v. Royce*, 2023 WL 2163677 at \*3 (D.N.D. Feb 22, 2023) (holding that  
 26 short-barreled rifles and shotguns are dangerous and unusual weapons not  
 27 protected by the Second Amendment); *United States v. Rush*, No. 22-CR-40008-  
 28 JPG, 2023 WL 403774, at \*3 (S.D. Ill. Jan. 25, 2023) (“*Bruen* had no impact on

1 the constitutionality of regulating the receipt or possession [of] an unregistered  
2 short-barreled rifle.”). The Court is not aware of any case in which a court has  
3 found that the Second Amendment protects the right of an individual to possess  
4 an unregistered short-barreled rifle.

This Court holds, consistent with *Heller* and *Bruen*, that an unregistered short-barreled rifle is not the type of weapon protected by the Second Amendment. Because the plain text of the Second Amendment does not encompass the type of weapon at issue here, Myers cannot succeed on subpart two of the first step of the *Bruen* analysis. Even if he could, he has not shown, as required by subpart three, that the Second Amendment protects his “proposed course of conduct.” The NFA does not bar possession of certain listed firearms; “[i]t simply requires their *registration.*” *United States v. Shepherd*, 2024 WL 71724, \*6 (S.D. Miss. Jan. 5, 2024) (emphasis original). Myers has not shown that the registration requirement is unconstitutional.

### III. CONCLUSION

16 For the reasons stated, Myers's motion to dismiss the Indictment (ECF No.  
17 35) is denied.

18 || Dated this 10<sup>th</sup> day of June 2024.

Anne Russell Traum  
ANNE R. TRAUM  
UNITED STATES DISTRICT JUDGE